

BOARD OF APPEALS CASE NO. 5084

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BEFORE THE

APPLICANT: Ginger Kilby

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ZONING HEARING EXAMINER

**REQUEST: Special Exception to allow a personal
care boarding home in the Agricultural District;
4403 Flintville Road, Whiteford**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 9/13/00 & 9/20/00

HEARING DATE: October 16, 2000

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Record: 9/15/00 & 9/22/00

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Ginger Hazel Kilby, is seeking a Special Exception pursuant to Section 267-53F(8) of the Harford County Code, to allow a personal care boarding home in an AG/Agricultural District.

The subject parcel is located at 4403 Flintville Road, Darlington, MD 21034 and is more particularly identified on Tax Map 12, Grid 1E, Parcel 20. The parcel consists of 64.28 acres, is zoned AG/ Agricultural and is entirely within the Fifth Election District.

Ms. Ginger Kilby appeared and testified that she is the owner of the subject parcel and the Applicant in this case. Ms. Kilby testified that she has been in nursing for 17 years and proposes to establish a personal care boarding home for up to 15 persons on the subject parcel. She owns and operates two other personal care boarding homes in Harford County. The subject parcel is presently improved by a large residence, a tenant house, several outbuildings and an apartment. There will be 3 nurses employed covering three shifts per day, seven days per week. Additionally there will be 2 employees per shift. Initially there will be 8 residents all requiring Level III care which the witness described as wheelchair bound, assisted feeding, assisted personal care. Later, she intends to add 7 more boarders for a total of 15 residents. A manager will live on site.

In order to actually operate the boarding home, the Applicant will need to obtain a number of inspections and permits from various county and state agencies. None of those licenses may be granted until zoning approval is obtained, however, the witness did produce applications for her license to the State Department of Health and Mental Hygiene.

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The Applicant concluded by stating that there is a great need in Harford County for this type of personal care boarding home. She operates two other similar facilities in Harford County and was proud of her outstanding reputation in this field of endeavor.

Mr. Anthony McClune testified on behalf of the Department of Planning and Zoning (Department). The witness indicated that the Department had thoroughly reviewed the Application and the requirements of the Harford County Code and concluded that this Application can meet or exceed all requirements. Additionally, the Department examined the impacts of this proposal in light of the Guides and Limitations set forth in section 267-9I of the Code and concluded that there were no adverse impacts associated with this application that would materially impact any neighboring properties. Mr. McClune stated that the proposal was compatible with the intent of the Code. The Department also placed in evidence a letter from the Harford County Health Department dated October 12, 2000 and entered into the record as Department of Planning and Zoning Exhibit 1. The letter indicated that the septic system will need to be upgraded, larger tank installed and percolation tests conducted to determine repair area and size upgrade.

CONCLUSION:

The Applicant is requesting a special exception to operate a personal care boarding home in an AG/Agricultural District pursuant to Harford County Code

Section 267-53F(8) which provides:

“Personal-care boarding homes. These uses may be granted in the AG, RR, R, R1, R2, R3, R4, RO, VB and VR Districts, provided that:

- (a) The proposed use shall be located in a single-family detached dwelling.
- (b) The proposed use meets the minimum lot size requirements for a conventional single-family residence in the district where located.
- (c) A maximum density of one (1) boarder per two thousand (2,000) square feet of lot area shall be maintained.
- (d) Adequate off-street parking shall be provided.
- (e) Where an application is for construction of a new dwelling, the building shall be similar in appearance to other single-family dwellings in the neighborhood.”

Section 267-51 provides:

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“Purpose.

Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1.”

Section 267-52 provides:

“General regulations.

- A. Special exceptions require the approval of the Board in accordance with §267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.**
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.**
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.**
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.**
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.”**

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The Hearing Examiner concludes that the Applicant has met or exceeded each of the requirements for grant of the special exception use in accordance with the requirements of Code Section 267-53F(8). Having met the specific technical requirements for the grant, the use must be examined in light of those judicial decisions that have considered the special exception use. The Maryland Court of Appeals, in its decision rendered in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981), has stated the applicable standards for judicial review of the grant or denial of a special exception use as follows:

“...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any facts or circumstances negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

“Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted.) These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” (emphasis in original) 291 Md. at 11-12, 432 A.2d at 1325.

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The Court of Appeals established the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:

“Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” 291 Md. at 15, 432 A.2d at 1327.

See also *Deen v. Baltimore Gas & Elec. Co.*, 240 Md. 317, 214 A.2d 146 (1965).

Given the standard set forth by the Court of Appeals, the Hearing Examiner concludes that this proposed use, at this proposed location, will have no adverse effects above and beyond those inherently associated with a personal care boarding home irrespective of its location within the AG District. This use is subject to any number of permits and inspections and is carefully regulated by the State government. Additionally, this Applicant has an admirable track record in establishing such facilities and operating them in accordance with state and local law and professional standards for such facilities.

Based on the totality of the facts presented and applying the standards set down in Schultz, the Hearing Examiner recommends approval of the special exception.

Date NOVEMBER 17, 2000

William F. Casey
Zoning Hearing Examiner